IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL CONFIRMATION CASE No. 6 of 2005
With
CRIMINAL APPEAL No. 2121 of 2005
With
CRIMINAL APPEAL No. 1988 of 2005
With
CRIMINAL APPEAL No. 140 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE A.L.DAVE
HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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STATE OF GUJARAT - Appellant(s)
Versus
PRAHLAD GYANESHWAR BHOIRE - Respondent(s)

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Appearance :
1. CRIMINAL CONFIRMATION CASE No.6 of 2005

MR SUNIT S SHAH, PUBLIC PROSECUTOR for Appellant(s) : 1,
MR BS SUPEHIA for Respondent(s) : 1,

2. CRIMINAL APPEAL No. 2121 of 2005

MR DP KINARIWALA for Appellant(s) : 1
MR SUNIT S SHAH, PUBLIC PROSECUTOR for Respondent(s) : 1

3. CRIMINAL APPEAL No. 1988 of 2005

MR BS SUPEHIA for Appellant(s) : 1
MR SUNIT S SHAH, PUBLIC PROSECUTOR for Respondent(s) : 1

4. CRIMINAL APPEAL No. 140 of 2006

MR BS SUPEHIA for Appellant(s) : 1
MR SUNIT S SHAH, PUBLIC PROSECUTOR for Respondent(s) : 1

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CORAM : HONOURABLE MR.JUSTICE A.L.DAVE

and

HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

Date : 12/03/2007

COMMON ORAL JUDGMENT
(Per : HONOURABLE MR.JUSTICE A.L.DAVE)

On 19th January, 2004, at about 1515 hours, four persons entered Bungalow No.21/B of Amrakunj Society, located in Ghoddod area of Surat under the pretext of checking/repairing the gas pipeline. At that time, there were two ladies in the house, i.e. Kanvita Dilipbhai Desai and Shobhana Dilipbhai Desai, who were daughter and mother, respectively. After some show of checking the pipeline, the four persons entered the house and caught hold of the two ladies and asked them to give key of the almirah and also robbed them of ornaments. When the process was on, Gunjan, son of Shobhanaben and brother of Kanvita, arrived at the house. As the main door was closed, he took a circuitous route and came to kitchen door opening in the compound. He was pulled into the

house by one of the four intruders and then he was assaulted upon. He was caused 12 serious injuries on vital parts of the body. Because of the injuries caused to him, he fell down. Two of the persons pushed the ladies into the bathroom, gagged their mouth and told them not to raise any alarm. They intimidated them by putting knife on their necks. Around the timewhen Gunjan arrived, the mobile phone, which was hung around the neck of one of the intruders, had rung.

1.1 In the meantime, Dilipbhai Desai, husband of Shobhana and father of Kanvita and Gunjan came home in his car along with his elder son, Swapnil. They also knocked the front door and then came towards the kitchen door opening in the compound. The intruders, initially dipped below the sill, then suddenly opened the door and pulled the duo into the house. Resistance was offered by both of them and more by Swapnil. He raised alarm. Both of them were assaulted upon by the intruders and three injuries were caused to Dilipbhai, one of which proved to be fatal. Several injuries were also caused to Swapnil, but because of the alarm raised by him, people rushed to the place and the intruders started escaping. They were chased by the neighbours and one of them, namely, Mahesh Gadhwali, came to be apprehended after a little chase. Police was informed and a First Information Report was lodged by Kanvita. On the basis of her F. I. R., offence

was registered and investigation made. In the midnight hours, on that very day, at about 0030 hours of 20th January, 2004, one Mahesh Babubhai Bhosle came to be arrested from a Guest House and, thereafter, accused-Prahlad Bhoire was arrested on 20th January, 2004 at 2200 hours. They were interrogated and, on information received by the police, accused No.3 - Jayesh Ambalal Patel was arrested on 22nd January, 2004, at 0305 hours. In the meantime, Mahesh Gadhwali tried to escape from the custody by snatching service revolver of Police Officer and, in that attempt, he got encountered.

1.2 The investigation was carried out, Panchnamas were drawn, postmortem was got performed, test identification parade was conducted and, ultimately, the police found that apart from accused - Mahesh Bhosle, Prahlad Bhoire, Jayesh Patel and Mahesh Gadhwali, one Vikram alias Vicky was also involved in the incident, who was absconding and, therefore, charge sheet came to be filed in the Court of learned Chief Judicial Magistrate, Surat, for the offences of dacoity, murder, conspiracy, etc. Since the offences were triable exclusively by a Court of Sessions, the case was committed to the Sessions Court, Surat and came to be registered as Sessions Case No.49 of 2004. The case was transferred to Fast Track Court No.12.

1.3 In the charge sheet, Vikram alias Vicky was shown as absconding accused and Mahesh Gadhwali was shown as expired accused and, thus, Mahesh Babulal Bhosle, Prahlad Bhoire and Jayesh Ambalal Patel were the three accused arraigned before the Court to face the trial. Charge was framed against the accused persons at Exhibit 4. All the three accused persons pleaded not guilty to the charge and came to be tried. Considering the evidence led by the prosecution, the Sessions Court came to a conclusion that the charges were proved against all the accused persons, i.e. Mahesh Babulal Bhosle, Prahlad Bhoire and Jayesh Ambalal Patel, and recorded conviction against them and passed the sentence as under:-

Mahesh Babulal Bhosle

1. R.I. for 5 years and fine of Rs.1,000/-, in default, S.I. for 2 months for the offence punishable under Section 395 of I.P.C.
2. Life Imprisonment and fine of Rs.500/-, in default, S.I. for 1 month for the offence punishable under Section 396 of I.P.C.
3. Imprisonment for 7 years for the offence punishable under Section 397 of I.P.C.
4. R.I. for 5 years and fine of Rs.500/-, in default, S.I. for 1 month for the offence punishable under Section 450 of I.P.C.
5. R.I. for 6 months for the offence punishable under Section 120(B) of I.P.C.

Prahlad Bhoire

1. R.I. for 5 years and fine of Rs.1,000/-, in default, S.I. for 2 months for the offence punishable under Section 395 of I.P.C.
2. Death Sentence subject to confirmation from High Court of Gujarat for the offence punishable under Section 396 of I.P.C.
3. R.I. for 5 years and fine of Rs.500/-, in default, S.I. for 1 month for the offence punishable under Section 450 of I.P.C.
4. Sentence for 6 months for the offence punishable under Section 120(B) of I.P.C.

Jayesh Ambalal Patel

1. R.I. for 5 years and fine of Rs.1,000/-, in default, S.I. for 2 months for the offence punishable under Section 395 of I.P.C.
2. R.I. for 5 years and fine of Rs.500/-, in default, S.I. for 1 month for the offence punishable under Section 396 of I.P.C.
3. R.I. for 6 months for the offence punishable under Section 120(B) of I.P.C.

1.4 Since accused No.2 - Prahlad Bhoire is awarded capital punishment, the question of confirmation of the said order has to be considered by this Court and was, therefore, accordingly, referred to this Court and Criminal Confirmation Case No.6 of 2005 came to be registered.

1.5 Against the conviction, all the three accused

preferred appeals. Accused No.1 - Mahesh Babulal Bhosle preferred Criminal Appeal No.140 of 2006, accused No.2 - Prahlad Bhoire preferred Criminal Appeal No.1988 of 2005 and Accused No.3 - Jayesh Ambalal Patel preferred Criminal Appeal No.2121 of 2005. Since all the three appeals and the Confirmation Case arise out of the same judgment and order, they are all heard together and are disposed of by this common judgment. For sake of convenience, the appellants are referred to in this judgment by their original status of accused.

2. Since the Confirmation Case would be dependent on the decision in appeal by accused No.2 - Prahlad Bhoire, we propose to deal with the appeals first.

3. Accused No.1 - Mahesh Babulal Bhosle and accused No.2 - Prahlad Bhoire are represented by learned Advocate, Mr. Supehia, in their respective appeals, whereas accused No.3 - Jayesh Ambalal Patel is represented by learned Advocate, Mr. Kinariwala. The State is represented by learned Public Prosecutor, Mr. Sunit S. Shah.

4. Learned Advocate, Mr. Supehia, submitted that even if the prosecution case is taken at face value, only four persons had entered into the house. Accused No.3 - Jayesh Ambalal was not even in the vicinity of the

bungalow, but was, allegedly, standing on the corner of the society to keep a watch and, therefore, his active participation in the incident at the place is not even alleged. Mr. Supehia submitted that the evidence indicates that no physical role is played by accused No.3 - Jayesh. That would leave behind only four persons who, even as per the prosecution case, who had trespassed into the house. This would take the case out of the sweep of definition of dacoity.

4.1 Mr. Supehia submitted that even as per the prosecution case, the conspiracy and/or common intention was that of committing robbery/dacoity and not murder. Therefore, the act of murder cannot be considered as an act in pursuance of either conspiracy or common intention.

4.2 Mr. Supehia submitted further that the evidence of eye-witnesses, Kanvita, Shobhana and Swapnil is inconsistent with each other and does not inspire confidence. The manner and sequence in which the incident occurred, as alleged by them, is inconsistent.

4.3 Mr. Supehia submitted that though four knives are brought before the Court, only two knives are alleged to contain blood marks. The other two were not even sent to F.S.L. for examination.

4.4 It is also contended that evidence of Swapnil, Shobhanaben and Kanvita does not corroborate each other nor do the circumstances corroborate the case of the prosecution.

4.5 The evidence in respect of presence of accused No.3 is sought to be established through oral evidence of two Limbachiya brothers, who run a Hair Dressing Saloon near the society. Through evidence of Anand Sovni, an Officer from Reliance Info. Limited, it is sought to be proved that accused No.3 contacted absconding accused Vicky through mobile phone while accused no.3 was present in the shop or near the shop around the time when the incident occurred, though it was not his usual practice. Accused No.3 was formerly staying in the society, but had left the society about three years back and was not used to coming to the Saloon or even in the area and the statements of telephone service provider, namely, Reliance, proved through witness - Anand Sovni, only establishes that a telephone subscribed in the name of accused No.3 was used for contacting absconding accused - Vicky on the date of the incident in the proximity of time of incident. It is the case of the prosecution that accused no.3 rang up absconding accused - Vicky when first he saw Gunjan going to the house and then Dilip and his son Swapnil, going to the house. Correspondingly,

the ringing of telephone was heard by Shobhanaben at the time of occurrence. Mr. Supehia submitted that the Limbachiya brothers do not speak of accused No.3 having used any telephone while he was with them and the statement of telephone user details tendered by the service provider does not indicate that two calls were made from the telephone subscribed in the name of accused No.3 to the telephone subscribed in the name of absconding accused - Vicky. There is nothing on record to show that these two phones were respectively with accused No.3 and absconding accused - Vicky. The prosecution has failed to establish these relevant circumstances.

4.6 Likewise, as per the prosecution case, the accused persons had stayed at Rupali Guest House, but there is no material to show that, on the day of the incident or on the day previous thereto, any of the accused had stayed there. The evidence produced from Rupali Guest House was that the accused had come to the Guest House on 6th January, 2004.

4.7 Mr. Supehia submitted that if the evidence is seen, possibility of deceased accused - Mahesh and absconding accused - Vicky having committed murder of deceased - Dilip and Gunjan cannot be ruled out. He submitted that there were four intruders. Only two of

them had knives and who was the person who had the knife or who used the knife is not properly established. There is lack of evidence to show as to who caused the fatal injury. Mr. Supehia submitted that, as there was no intention of committing murder, even as per the prosecution case, there is no question of fixing any vicarious or constructive liability on the other accused persons.

4.8 Mr. Supehia submitted that the discovery of knives is also doubtful and not properly established. The Panch witnesses have not supported the discovery. Panchnama has not been drawn, as envisaged under Section 27 of the Evidence Act.

4.9 The evidence on discovery of two knives (Muddamal Article 50) is conflicting. As per the Panchnama, the knives were discovered from beneath a steel almirah in the parking lot of the apartment by accused No.3 whereas, as per prosecution witness No.7 - Ramubhai Bachubhai Katara, it was he who discovered the knives from beneath a steel almirah and handed over to the police.

4.10 It was contended that the investigation is not properly carried out in an independent and unbiased manner. There is no material to show how Mahesh Gadhwali

came to be encountered. The blood samples of Swapnil and Shobhana were not taken although both of them claimed to have sustained injury. Muddamal Article 50 (two knives) have not been sent to F. S. L. for inspection and investigation. Accused No.1 had sustained injury on his hand during the incident, but he has not been sent for medical check-up and/or treatment.

4.11 Mr. Supehia submitted that there is no evidence to show that any of the accused had stayed in Rupali Guest House on the relevant date. He submitted further that Panch witnesses have not supported some of the Panchnamas and, therefore, they may not be believed although the Investigating officer has deposed before the Court in respect of those Panchnamas. According to Mr. Supehia, reliance can be placed on Investigating Officer's deposition provided he is found to be of high integrity and efficiency, which is not the case here, as can be seen from the lapses made by the Investigating Officer, as narrated above. Mr. Supehia, therefore, submitted that the conviction is not well founded and may be set aside.

4.12 Alternatively, Mr. Supehia submitted that, even if the Court finds that conviction of accused No.2 is well founded, the sentence awarded by the Trial Court is disproportionate to the offence. The case cannot be

considered as a rarest of rare cases calling for capital punishment. Mr. Supehia submitted that the Trial Court erred in ordering the sentences awarded to accused No.1 and accused No.2 for different offences to run consecutively and not concurrently and, therefore also, the Court may entertain the appeals and dismiss the Confirmation Case.

5. Learned Advocate, Mr. Kinariwala, represents accused No.3 in Criminal Appeal No.2121 of 2005. He submitted that the case against original accused no.3, at the best, is that he supplied information to rest of the accused and at the time of the incident, kept watch while remaining outside the society. Mr. Kinariwala submitted that if evidence of p.w.3 – Dineshsinh Manglusinh Thakor, who happens to be a watchman, is seen, he does not claim to have noticed or seen accused no.3 standing near the corner or junction of the society.

5.1 Mr. Kinariwala submitted that there is no direct evidence or even indirect evidence to show that accused no.3 gave any information to any of the other accused persons. So far as keeping of watch at the time of the incident is concerned, the watchman has not seen the accused no.3. The prosecution has tried to prove presence of accused no.3 near the society by examining two witnesses namely, Sanjay Limbachiya and Rakesh

Limbachiya who run their hair-cutting Saloon near the society. According to them, they knew accused no.3 because accused no.3 was formerly staying in this very society but had shifted to some other place about 4-5 years back. He came to their shop after a long lapse of time and had a shave and thereafter, waited either near the shop or in the shop and had a cup of tea and a cigarette and on hearing the hubbub, had left. Mr. Kinariwala submitted that a man who is keeping a watch would not go to a shop and have a shave because in such an eventuality, his attention would be diverted. That apart, Mr. Kinariwala submitted that the evidence of these two witnesses is inconsistent with each other. Whether accused no.3 was coming there off and on or he went to their shop after a long time is a matter of controversy between the two. Likewise, whether he took tea and cigarette while sitting in the shop or outside the shop is also not consistently disclosed by these witnesses. The two witnesses, if at all they are consistent, are consistent on one aspect that neither of them noticed accused no.3 using his mobile phone. Mr. Kinariwala submitted that the prosecution's attempt is to prove that accused no.3, with the help of his mobile phone, rang up Vikram @ Vicky - the absconding accused on two occasions, (1) when he noticed Gunjan going home and (2) when he noticed Swapnil's father Dilip going home and this aspect is reflected from deposition of Shobhanaben

who speaks about ringing of telephone of Vicky on two occasions. Mr. Kinariwala submitted that if accused no.3 was under the surveillance of Limbachiya brothers and if neither of them speak about accused no.3 having used his mobile phone during the time of the incident, then merely because Shobhanaben heard telephone of Vicky ring, would not establish a link between accused no.3 and Vicky or any of the accused. It could be anybody else calling Vicky.

5.2 Mr. Kinariwala submitted further that the two statements produced by the prosecution which are obtained from the Mobile Phone Service Provider relating to the telephone of accused no.3 and absconding accused - Vikram @ Vicky show that these two persons were subscribers to the mobile phone. Mr. Kinariwala submitted that there is not an iota of evidence to show that, in fact, accused no.3 was the subscriber to the telephone and the possibility of somebody else having subscribed to this telephone under the name of accused no.3 can be ruled out. Mr. Kinariwala also submitted that there is no evidence to show that accused no.3 was in possession of the telephone at the relevant time. He submitted that there is no evidence whatsoever in respect of absconding accused - Vikram @ Vicky being subscriber to the telephone. Even his identity is also not properly fixed or established.

5.3 Mr. Kinariwala submitted that even if the two statements (Exhs.91 and 92) are taken at face value, they indicate that a number of calls have been made from the telephone subscribed in the name of accused no.3 to the telephone number subscribed by Vikram. A close look at the statements would also indicate that none of the calls made from the telephone of accused no.3 was during the period during which the incident is alleged to have occurred. He also submitted that assuming that there may be some difference in timings of the watches, then also there are no two phone calls made from the telephone subscribed in the name of accused no.3 to the telephone subscribed in the name of Vikram within a span of 20-25 minutes which outer limit of time span between two calls can be reasonably fixed while accepting the prosecution evidence at face value. Therefore also, the evidence in form of the two statements cannot be considered as sufficient or reliable to establish nexus between accused no.3 and rest of the accused or to show involvement of accused no.3 in the incident, even remotely. Mr. Kinariwala, therefore, submitted that the Trial Curt erred in holding accused no.3 guilty for the offences and convicting and sentencing him. Therefore, the appeal may be allowed.

6. Learned Public Prosecutor Mr. Sunit Shah has

opposed the appeals. He submitted that taking the case of accused no.3 first, his conduct is indicative of his involvement. Mr. Shah submitted that it has come in evidence of Limbachiya brothers that the appellant was formerly staying in the society. He, therefore, had friends, acquaintances and associates in the society and he, therefore, had opportunity of knowing and ascertaining the daily routine of the victim family. As regards the conduct of accused no.3 at the time of incident, Mr. Shah submitted that although he was not visiting the place for quite some time, oddly; he came to the hair-cutting shop at an odd hour for a shave and remained there under the pretext of having tea and cigarette till there was a hubbub. Mr. Shah submitted that if accused no.3 had stayed in the society for a long time and had friends and acquaintances in the society, his normal conduct on hearing such a hubbub would be to enquire as to what has happened by going to the society. Instead, he goes away. This conduct is unnatural on his part.

6.1 Learned Public Prosecutor Mr. Shah submitted that so far as rest of the accused are concerned, it is true that one of the accused (Mahesh Gadhwali) died in an encounter. It is equally true that Vikram @ Vicky is absconding but according to Mr. Shah, this would not affect the prosecution case in any manner because the

prosecution case has consistently been that five persons were involved and presence of all five at the time of incident is established by the prosecution through evidence of eye-witnesses and Limbachiya brothers. According to Mr. Shah, it would be a case of dacoity and, therefore, the liability of all of them would be joint and several.

6.2 Mr. Shah submitted that it may be that the group may not have hatched a conspiracy for murder and/or they may not have a common intention of causing murder when they went to the house for commission of the crime but common intention may creep in at any moment and that can be seen from the conduct of the accused at the time of the incident. Mr. Shah submitted that it has come in evidence that all four intruders jointly attacked Gunjan. The injuries found on the person of Gunjan is a self-speaking evidence. There are as many as 12 injuries found on his person. Mr. Shah submitted that Muddamal articles no.33 and 13 both contained bloodstains. Muddamal article no.33 which was discovered by Mahesh Bhosle (accused no.1) contained blood of 'A' and 'B' group. These blood groups are of Dilip and the accused no.1 himself. Muddamal article no.13 which is found from the place contained blood of the group of 'A' and 'O' which is of both the deceased. It is indicated by learned Public Prosecutor that clothes of accused no.2

contained blood of the groups of both the deceased. If an overall picture is taken, Mr. Shah submitted that all four persons attacked Gunjan jointly and both the knives contained blood of deceased Gunjan and one knife contained blood of Dilip which would mean involvement of all four persons in the incident. Learned Public Prosecutor Mr. Shah submitted that admission of eye-witness Swapnil that the person who attacked Dilip has expired i.e. original accused - Mahesh Gadhwali will be of no consequence in light of this evidence that all four jointly attacked Gunjan and the find of blood-stained clothes.

6.3 Learned Public Prosecutor Mr. Shah, therefore, submitted that none of the appeals can be said to have any merits and the appeals may, therefore, be dismissed.

6.4 Mr. Shah submitted that so far as Confirmation Case is concerned, it requires to be accepted and capital punishment awarded by the Trial Court to accused no.2 deserves to be confirmed. According to Mr. Shah, here is a case where five persons have deliberately hatched a conspiracy to commit a dacoity with such a firm determination that they do away with the lives of two persons and injure the third who came in their way of committing dacoity. The murders are committed only with an intention of fulfillment of their plan of dacoity. A

more serious crime is committed to assist the commission of a less serious crime. Accused no.1 has criminal antecedents, as established by the prosecution. Accused no.2 has also criminal antecedents but unfortunately, the prosecution could not bring evidence in this regard. Gunjan has been done to death with about 12 injuries. He was a young boy of 19 years of age and was not armed. He could not have been, in any way, a danger to their lives but they chose to do away with him and all four who were in the bungalow have jointly attacked deceased Gunjan. The accused persons seem to have no value of human life in their mind and, therefore, the case would fall in the category of rarest of rare cases. The court may view the case seriously and confirm the capital punishment of accused no.2 awarded by the Trial Court. This would be a good deterrent for those who are on the threshold of entering crime world. He, therefore, submitted that the appeals may be dismissed and capital punishment be confirmed.

7. In rejoinder, Mr. Supehia submitted that according to Kanvita, she does not know anything about the incident relating to Gunjan. Eye-witness Swapnil says that the person who attacked Dilip has expired i.e. Mahesh Gadhwali and, therefore, neither accused no.1 nor accused no.2 can be fastened with the murder of Dilip and, therefore, it would be, at the most, a case of a

single murder which would involve accused no.1 and 2, even if other contentions are not accepted. The case, therefore, would not fall in the category of rarest of rare cases.

8. Mr. Kinariwala, in rejoinder, submitted that the identity of absconding accused - Vikram @ Vicky is not established at all lest his subscribership to the telephone and his possession at the time of the incident and, therefore, the statements relating to both the telephones would not establish the link between the two of them.

9. We have taken into consideration rival side contentions. We have examined the record and proceedings from the angle suggested by learned advocates.

10. Having considered the contentions, for the sake of convenience, we are of the view that case of accused no.3 would call for consideration first as that would reflect on the question whether the act would fall in the category of dacoity or robbery.

11. Without any dispute, it is the prosecution case that only four persons entered the house. That group of four persons comprised of accused no.1, accused no.2, absconding accused - Vikram @ Vicky and encountered

accused - Mahesh Gadhwali. The prosecution case against accused no.3 is that he collected information, passed it over to the rest of the accused and then hatched a conspiracy of committing robbery/dacoity and then, while the other four went to the bungalow of the victim, accused no.3 remained outside the society around the corner and remotely assisted the group by keeping a watch and cautioning them on arrival of other family members.

11.1 Evidence of first informant - Kanvita (Exh.19), eye-witness Shobhana (Exh.21) and eye-witness Swapnil (Exh.23) do not, in any manner, indicate involvement of accused no.3 in the incident. In fact, despite a close scrutiny, we could not lay our hands on any piece of evidence nor could learned Public Prosecutor indicate any piece of evidence to show that accused no.3 had earlier kept a watch and had passed over the information derived through such a watch to rest of the accused. Therefore, the first charge against accused no.3 that he kept a watch and passed over information to the rest of the accused in furtherance of a conspiracy hatched by them does not stand established.

11.1.1 There is no evidence worth a name to show any nexus or relationship between accused no.3 and accused no.1 or accused no.2 or Mahesh Gadhwali. The mobile phone evidence shows that accused no.3 had made some

calls to subscriber Vikram Patel. But there is no evidence to show that subscriber Vikram Patel is the absconding accused Vikram @ Vicky and that he was the person with mobile phone in the group of four intruders. And therefore, there is no evidence to show any nexus between accused no.3 and rest of the intruders.

11.2 So far as his participation in the incident and remotely helping the rest of the accused by keeping a watch while remaining outside the society round the corner is concerned, evidence of Sanjay Limbachiya (Exh.29) and Rakesh Limbachiya (Exh.65) are relevant.

11.2.1 Sanjay Limbachiya, in his deposition (Exh.29), initially has stated that accused no.3 is known to him as he was staying in the area formerly but has shifted to another house about 4-5 years back. He has deposed that he has stopped coming to his shop for about 3-4 years. However, on 19th January, at about 4.00 p.m., accused no.3 came to his shop for having a shave. The witness enquired of accused no.3 as to why he is seen after a long time and he was informed by the accused no.3 that just for having a shave. Thereafter, Rakesh shaved the beard of accused no.3 and thereafter, accused no.3 went outside the shop and was standing there. He called for a cup of tea and a cigarette, had both of them and in the meantime, there was a hubbub in Amrakunj Society and they

saw a crowd running and Accused no.3 went away therefrom. During cross-examination, the witness admits that he does not keep a watch over passers-by. He also admits that it is quite possible that accused no.3 may have come been visiting his shop in his absence.

11.2.2 In context of this deposition, if deposition of brother of this witness - Rakesh Limbachiya (Exh.65) is seen, he says that accused no.3 had come to his shop for a shave and he (the witness) had shaved his beard. Thereafter, accused no.3 sat on a chair and had a cup of tea and a cigarette and around that time, there was a hubbub, people were running helter-skelter and thereafter, he did not know as to whether accused no.3 went.

11.2.3 During cross-examination, he admits that he does not know as to how many customers had come to his shop on the day of the incident. He admits that accused no.3 had friends and relatives in the Society and he used to come in the area off and on. He also states that around the time of the incident, accused no.3 was in the habit of standing near their shop. He does not know as to where accused no.3 had gone on hearing the hubbub.

11.3 What emerges from these two depositions is that there are conflicting versions on the question as to

whether accused no.3 was going in the area and shop off and on. One of the brothers states that accused no.3 came to their shop after a long time and he enquired about it from him whereas the other brother states that accused no.3 was in the habit of coming to that area and used to come to the shop also.

11.4 Both these witnesses do not speak of accused no.3 having used the mobile phone for any talk either once or twice. In fact, they do not even speak about accused no.3 having a mobile phone with him.

11.5 It is also worth a note that neither of them say anything on the question as to where accused no.3 went when there was a hubbub, whether he ran away or went into the society is also not known and, therefore, it is not possible for us to proceed on a premise that accused no.3 escaped from that place and, therefore, the contention of learned Public Prosecutor that his conduct of escaping from the place on hearing the hubbub reflects involvement of accused no.3 in the incident cannot be accepted.

11.6 If the second piece of evidence to show nexus between accused no.3 and rest of the accused particularly, absconding accused - Vikram @ Vicky is seen, the prosecution has produced two statements

relating to the mobile phones of Vikram Patel and accused no.3. They are at Exhs.91 and 92 respectively. Both the bills reflect only the telephone calls made with the said instruments. The prosecution case is that accused no.3 has made telephone calls to Vikram to warn the group of intruders about arrival of Gunjan, Dilip and Swapnil. If we peruse Exh.92, it reflects that on 19th January, 2004, in all, 17 calls were made from the telephone of accused no.3. Out of those, 9 calls were made to the telephone of Vikram @ Vicky and out of these 9 calls, one call was made at 1458 hours and the next call on that phone was made at 16:09:57 hours after a phone call made at about 1507 hours to another number. The incident is alleged to have occurred at about 3.15 p.m. (1515 hours) and lasted for about 45 minutes. If that time is taken at its face value, then none of the calls allegedly made by accused no.3 to Vikram was made during this time span. Assuming that there was some error or difference in recording of time by the witnesses, at the best, a telephone call made by accused no.3 to Vikram @ Vicky at 1458 hours may be taken into consideration but if that is so, there is no call made from that phone to the phone in the name of Vikram within 20-25 minutes and, therefore, the theory of the prosecution that accused no.3 used his telephone in order to ring to Vikram to warn him which was heard by witness Shobhana cannot be accepted. Shobhana may have heard the ring but there is no evidence to show that the

said ring was given by accused no.3.

11.6.1 There is no evidence worth any that accused no.3 carried the said telephone with him on the day of the incident. He went to have a shave to Limbachiya brothers. The identity of Vikram @ Vicky and identity of his telephone and the fact of his possessing this very phone is not established at all. It is, therefore, unsafe to assume that because accused no.3 is named as a subscriber, he had the said telephone with him at the time of the incident.

11.7 We may observe that the prosecution case that accused no.3 kept a watch and informed rest of the accused about the condition of the victim family is examined, it does not appeal to us much for the reason that if that was so, the assailants would not have selected the day of the incident for the attack for the reason that that was a day on which the victim family's factory was closed because of weekly straggering and the assailants would have anticipated return of the male folk of the family during afternoon unlike a working day and the group of four wound not have been required to enter the house and ascertain the presence of male folk or otherwise under the pretext of gas-pipeline repairs.

11.8 In our view, therefore, if all the factors

discussed above namely, that there is no satisfactory evidence to show a link between accused no.3 and rest of the accused on telephone, that there is no evidence worth a name that accused no.3 informed rest of the accused, that accused no.3 and the rest of the accused hatched a conspiracy, that accused no.3 was keeping a watch while standing near the shop of Limbachiya brothers and that there is no evidence to show that accused no.3 fled away from the place when there is no evidence to show as to where he went, we are of the view that the prosecution has erroneously implicated accused no.3 in the incident and the Trial Court erred in accepting the case of prosecution and convicting accused no.3 for offences punishable under Sections 395 and 396 read with Section 120(B) of I.P.C. and sentencing him to undergo R.I. for five years and to pay a fine of Rs.1,500/- in all, and to undergo further imprisonment for a period of three months in all, in the event of default. In our opinion, therefore, Criminal Appeal No.2121 of 2005 preferred by accused no.3 - Jayesh Ambalal Patel merits acceptance.

12. Now that we have come to a conclusion that involvement of accused no.3 is not established by the prosecution, the complexion of case against rest of the accused would change *ex facie* to the extent that the case of dacoity against them would go because of the definition of dacoity, as envisaged under Section 391 of

I.P.C.

13. So far as the case against accused no.1 and accused no.2 is concerned, the prosecution case is that they were part of the group of four who went into the bungalow under the pretext of gas-pipeline checking/repair and after verifying absence of male folk, committed the act of robbery with the help of knives. In this regard, oral testimony of first informant – Kanvita Dilipbhai Desai (Exh.19), Shobhana Dilipbhai (Exh.21) and Swapnil Dilipbhai (Exh.23) are very relevant.

13.1 First informant – Kanvita, in her deposition, states that the incident occurred on 19th January, 2004 when she and her mother (Shobhana) were present in the house. At that time, four persons came. One of them was wearing a light-blue coloured full-sleeve shirt and a mobile phone was hanging from his neck. He was wearing black coloured glasses. These persons came to their house at about 3.15 p.m. They said that they were coming from Gas Company and gas meter is to be checked. They checked the gas meter, moved around the house in the compound and then entered the house. Two of them had knives. The two persons who had knives with them put their respective knives on the neck of the witness and her mother, tied their hands and demanded key to the almirah. In the meantime, her younger brother Gunjan

came and those persons started beating him and thereafter the intruders put the witness and her mother in the bathroom. Her mother somehow came out of the bathroom to rescue Gunjan. At that time, one man was keeping watch over the witness. In the meantime, Dilipbhai and Swapnil came by car. They rang the door-bell 2-3 times but the main door was closed. Therefore, they came to the kitchen door. The intruders attacked her father (Dilipbhai) and her brother (Swapnil). She heard shouts of her father and brother. She came out of the bathroom and found that the four persons had escaped. Her father was injured on left side of the chest and Gunjan had injuries on neck. Her mother had an injury on her left thumb and Swapnil had injuries on his body. Hearing the shouts, the neighbours came and took her father, brothers and mother to New Life Hospital where her father and brother Gunjan were declared dead. The assailants had taken away wristwatch, gold chain etc. The total worth of the booty robbed was about 42,000 rupees. One of the assailants was speaking Gujarati language. She testifies about having identified the assailants at the T.I. parade held on 28th of that month. She identifies the assailants as accused no.1 and accused no.2 in the court also. She says that accused no.1 was the person who had put knife on her neck and accused no.2 had put knife on the neck of her mother.

13.1.1 During cross-examination, she states that the Society has no entrance gate. It also emerges that there is a gate or entry to the compound of the bungalow. She denies the suggestion that the assailants were masked. She also denies the suggestion that because they were scared, they could not see the faces of the assailants. She states that when the assailants entered into the house, they did not raise any shouts because their mouths were gagged and knives were put on their necks. Her mother's mouth was also gagged. It emerges from cross-examination that after about 15 minutes of the assailants' entering the house and committing assault, her father and brother had come. At that time, she was in the bathroom. She also states in her cross-examination that her younger brother (Gunjan) had come to the house after about 10 minutes from the commencement of the incident and the incident lasted for about half an hour. She states that she had not seen the police and the accused standing outside when she went for T.I. parade. She states that she could identify the assailants as the accused as she had remembered their faces.

13.2 Shobhanaben Dilipbhai Desai (Exh.21) is another eye-witness to the incident who was present with the first informant - Kanvita. She also states in her deposition that the incident occurred on 19th January,

2004. She states that at about 3.00 p.m., four persons came to their house. One person was wearing dark-blue pant and light-blue shirt and a mobile phone was hanging from his neck. He was wearing black glasses and he had a knife in his hand. She states that on 13th January, 2004, three persons had come to the house. At that time, besides her, her daughter - Kanvita and daughter-in-law - Meghna were present in the house whereas on 19th January, 2004, one additional person was with the assailants and at that time, the witness herself and daughter Kanvita were the only two persons present in the house. Meghna had gone to her parental home. The intruders told them that they had to check the gas line. They demanded some powder and a bucket which she gave. After about 10 minutes, the intruders told her that the pipe line is checked and is clean and she, therefore, went to the kitchen. Her daughter was sitting on the dining-table when the intruders suddenly came into the house and caught hold of both of them and put knives on their neck. They enquired about the almirah and money. She says that she was slapped by one of them. In that scuffle, she sustained injury on her left thumb. She says that her mouth was gagged and hands tied. She was intimidated and was asked to keep quiet and to hand over whatever is available. In the meantime, Gunjan came through the kitchen door and at that time, the mobile phone of the person wearing sunglasses rang. Gunjan

knocked the door and, therefore, they opened the door and pulled him inside the house and when she shouted 'Gunjan', her mouth was gagged again and they assaulted Gunjan on his neck. Gunjan fell down. The assailants took both the ladies into the bathroom. The man wearing sunglasses started beating her and put pressure on the neck of her daughter. She told them that the key to the almirah is beneath the mattress. They found out the key, opened the almirah and took whatever they found. She says that her chain and ring was robbed. In the meantime, after about 2-3 minutes, her husband and son Swapnil came in the car. At that time also, the mobile phone of the assailants rang. When her husband rang the door-bell and the door did not open, they came to the kitchen door when they were suddenly pulled inside the house by two persons after suddenly opening the door. One of them caught hold of her husband and another gave knife blows to her husband on the chest. The other had a scuffle with Swapnil. Swapnil was also given knife blows on the neck and abdomen. Swapnil was successful in catching hold of one who suffered injury on his hand. Swapnil raised shouts and defended himself. The assailants started running away and Swapnil chased them. They had thrown Gunjan into the store-room. The witness says that their total loss was about Rs.40,000/- to Rs.50,000/- in the form of bsngles, diamond Mangalsutra, tops etc. On the 28th, the T.I. parade was held and she

had identified accused persons out of 22 persons. She states that Mahesh Babubhai Bhosle (accused no.1) was the person who has put knife on the neck of the daughter and accused no.2 had put knife on her neck. She also says that accused no.2 is the person who gave blows on the neck of deceased Gunjan and she does not exactly remember as to who was the person who committed assault on Dilipbhai. She identified Jayesh Ambalal Patel (accused no.3) also. During cross-examination, it emerges that the road in front of the bungalow is an alley with dead end and is not used generally by people for passage. She says that she was in the bathroom for about 7-10 minutes and at that time, two persons were with them. When her husband arrived, the person who was with her with a knife on her neck rushed towards the door. She says that out of four, two persons had knives with them. She admits a suggestion, during cross-examination, that four persons collectively had a scuffle with her husband and son Swapnil and that she would not be able to exactly state as to which knife caused which injury.

13.3 Swapnil Dilipbhai Desai is examined at Exh.23. He says that he is the eldest son of Dilipbhai Desai. His wife is Meghnaben. His sister is Kanvita. He had a younger brother - Gunjan. On 19th January, 2004, the factory was closed because of 'electric' straggering. He and his father went out around 12.30 p.m. in the car and

returned around 2.30 and then after taking meals, they went out at about 3.00 p.m. His wife Meghna has gone to her parental house and Gunjan was also out. Shobhanaben and Kanvita were at home. He says that he and his father left the house at about 3.00 pm. and returned at about 3.45 p.m.. At that time, the main door was closed. He says that when they returned, they found that the compound gate was closed. They rang up the call-bell on the main door but as the door was not opened, they went towards the kitchen door. They found three persons standing there. They also found some blood on the floor. He, therefore, suspected that something serious has occurred. He started raising shouts. So one of the three persons pounced on him and gave him knife blows on the left abdomen and left neck. Another person attacked his father and gave knife blows on the chest. His mother raised shouts. He also raised shouts and, therefore, the three persons started running away. At that time, one person emerged from the house and he also started running. The neighbouring people came there hearing the shouts and shifted them to New Life Hospital. The witness identifies accused no.1 as the person who committed assault on him. The witness says that the person who had assaulted his father has died.

13.3.1 In the cross-examination, it emerges that the persons who had assaulted on him and his father were

having weapons with them. He does not remember about others. He denies a suggestion that he was not fit to undergo the T.I. pParade. He denies a suggestion that the accused were handcuffed at the time of conducting the T.I. parade.

14. What emerges from the depositions of these three eye-witnesses is that the four persons went to the house of Dilipbhai together at about 3.15 p.m. and managed to have an entry under the pretext of checking the gas pipeline. One of them was so dressed to create an impression that he is a man from the Gas Company and after pretending to have checked the gas line, they entered into the house and assaulted the two ladies, robbed them of a gold chain and other ornaments, demanded key to the almirah and robbed other valuables from the almirah and in doing so, they used intimidation and force with the help of knives. It also emerges that around that time, Gunjan came and after being pulled into the house, he was assaulted upon by all four persons. Obviously, the witness would not be able to specify as to which injury was caused by whom but the fact remains that all of them committed assault on Gunjan collectively.

14.1 It also emerges that when Dilipbhai and Swapnil came, again they assaulted both of them with knives. Both Swapnil and Dilipbhai sustained knife injuries, as

can be seen from the medical evidence. The injuries are attributable to the Muddamal knives as Articles No.13 and 33, one of which was discovered by accused no.1 and one was found from the spot. Incidentally, the discovery is properly proved by examining the panch witness and the Investigating Officer.

15. The post-mortem notes of Gunjan indicates that he sustained 12 injuries attributable to the knife. They were on the neck, a vital part of the body. Dilipbhai had three injuries on his person out of which external injury no.2 which is a stab wound on the left side of the chest which has gone deep into the cavity and has caused damage on his heart. The doctors have deposed that the injuries were sufficient in ordinary course of nature to cause death and, therefore, it can be said that both Gunjan and Dilipbhai died a homicidal death.

15.1 Considering the medical evidence and the evidence of eye-witnesses, it is clear that accused no.1 and accused no.2 were involved in the episode and had actively participated in the entire incident including robbery, murder and causing hurt.

15.2 Obviously, F.I.R. would not contain the name of the intruders or assailants and the nexus is sought to be established by the prosecution through T.I. parade. The

conduct of T.I. parade is established through deposition of Executive Magistrate Mr. Haribhai Kevalbhai Patel (Exh.80) and the panchnama is at Exh.81. If we see the depositions of the eye-witnesses together with the deposition of Haribhai Kevalbhai Patel - the Executive Magistrate so also the deposition of the Investigating Officer, we find that there is no material to suspect proper conduct of the T.I. parade. However, the T.I. parade is assailed by learned advocate Mr. Supehia mainly on the ground that it was conducted after 8 days of arrest. However, we find that the procedure for conducting the T.I. parade has been properly followed but so far as delay part is concerned, it appears that Swapnil was injured and was in hospital, as can be seen from the deposition of the Investigating Officer. Even Swapnil has deposed to this effect. This would reasonably explain the delay and it would not be fatal to the prosecution unless it is shown that the delay has resulted into prejudice to the accused. In this regard, we may refer to the decision in the case of **PRAMOD MANDAL vs. STATE OF BIHAR [(2004) 13 SCC 150]** where the T.I. parade was conducted after about one month. The Apex Court observed that there is no fixed rule as regards the period within which the T.I. parade must be held or number of identifying witnesses. It is for the court to decide on the facts and circumstances of the case and evidence on record whether to accept or reject the

evidence of identification. When the defence failed to impute any motive to the prosecution for delay in holding the T.I. parade nor the defence alleged any irregularity in holding the parade, the delay of one month in holding the parade was held to be non-fatal to the prosecution case. In the case on our hand no motive is imputed on prosecution for delay in conduct of T.I. Parade. Thus, when the eye-witnesses have given description of the assailants, have identified them in T.I. Parade and have identified them in the court, we are of the view that identity of accused no.1 and accused no.2 is properly established by the prosecution and consequently their involvement in the incident.

16. It was vehemently contended by learned advocate for the appellant Mr. Supehia that who caused which injury is not properly established by the prosecution. Kanvita is not able to say anything about assault on Gunjan. Shobhana states about assault on Gunjan but is not clear on the assault on Swapnil or Dilipbhai. Version of these two witnesses would be doubtful because they say that they were posted in the bathroom and two persons were keeping watch on them. Both of them had knives with them. There are only two knives used in commission of the offence. The persons who were keeping a watch on them were accused no.1 and accused no.2 and, therefore, the prosecution case should not be believed.

16.1 We are afraid, we are unable to accept this contention raised by the learned advocate for the appellant. It has specifically come in evidence that Shobhanaben has seen accused no.2 assaulting Gunjan. It has also come in evidence that when Dilipbhai and Swapnil entered the house, the two persons keeping watch on the two ladies in the bathroom rushed outside and they were followed by Shobhanaben and Shobhanaben has seen the assault being committed on Swapnil and Dilipbhai. It is during cross-examination of Shobhanaben that it emerges that all four persons had assaulted her husband and Swapnil and, therefore, the act is committed by all four by a concerted act.

16.2 Apart from the version of the eye-witnesses, there are other circumstances which also lead us to believe the version of these eye-witnesses. Muddamal article no.33 – knife is discovered by accused no.1 and it contained blood of Dilip (human blood group 'A'). It also contained human blood group 'B' which is found to be of accused no.1 and accused no.2 both. Clothes of accused no.1 contained blood group 'B of both the accused. This discovery of Muddamal Article No.33 is proved by examining panch witness Jaykumar Kamleshbhai Joshi at Exh.60 and the discovery panchnama is at Exh.61. Accused no.1 had an injury on his hand. This would

explain presence of blood of the accused himself on the knife.

16.3 So far as Muddamal article no.13 is concerned, it is found from the place but it contained blood of both the deceased – Group 'A' and Group 'O'. So far as accused no.2 is concerned, it is also to be noted that his clothes were sent to F.S.L. for serological examination and it is found that his clothes contained blood group 'A' and 'B'.

16.4 The above factors clearly establish involvement of accused no.1 and accused no.2 both in the incident not only of robbery but also of murder of both Gunjan and Dilip. It is also relevant to record that accused no.2 has not explained presence of blood of the deceased on his clothes.

17. It was argued that the assailants are not even alleged to have hatched any conspiracy or to have any common intention of causing murder of these persons and, therefore, their liability would be individual. It is possible that they may not have hatched a conspiracy for murder or may not have had a common intention of causing murder when they entered the house but that intention may have creeped in when they were obstructed from pursuing their common intention of robbery. There cannot

be any verbal evidence in this regard but the circumstances and conduct can be examined to assess presence or absence of common intention.

17.1 It has come in evidence that all four of them jointly committed assault on deceased Dilipbhai and blood of deceased Dilip is found on clothes of accused no.2 as well as accused no.1. The knife discovered by accused no.1 contained blood of Dilipbhai. Therefore, the fact that both of them were involved in the incident is a fact proved by these circumstances.

17.2 It has also come in evidence that Gunjan was brutally assaulted. There were as many as 12 injuries found on person of Gunjan which are of serious nature. The injuries were found on vital parts of the body. Obviously, when the incident has lasted for a short spell, the assault could not have been by only one person. Considering the number of injuries and nature of injuries, knowledge that the injuries are so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death of the deceased, can be inferred on the part of the assailants namely, the accused no.1 and accused no.2.

17.3 We are, therefore, of the view that even after examining the evidence from all or any of the angles

suggested by learned advocate Mr. Supehia there is no scope for any doubt in the prosecution case or to visualise even slightest possibility of innocence of accused no.1 and accused no.2. Criminal Appeal No.1988 of 2005 and Criminal Appeal No.140 of 2006 can not be accepted wholly. Conviction of accused no.1 and accused no.2 under Section 395-396 of I.P.C. deserves to be

17.4 Since this court has come to a conclusion that charges against accused no.3 are not proved, case against accused no.1 and accused no.2 for Dacoity or Dacoity with murder would not stand. Therefore, their convictions under Sections 395 and 396 of I.P.C. also cannot be permitted to stand.

17.5 However, they are found to have committed murder of Gunjan & Dilipbhai and deserve to be convicted therefor. We notice that charge for murder was also levelled against them.

18. Now comes the question of consideration of punishment and in that regard, we will have to examine the merits of Criminal Confirmation Case. The Trial Court has awarded capital punishment to accused no.2 - Prahlad Gyaneshwar Bhoire. We have heard learned Public Prosecutor Mr. Shah on this aspect. According to him, a young boy of 19 and his father both have been done to

death only for the purpose of pursuing illegal object of committing robbery. Deceased Gunjan had 12 injuries on his person caused by knife and as such, he has been brutally murdered and, therefore, capital punishment has rightly been awarded. In this regard, we may refer to **MOHD. CHAMAN vs. STATE (NCT OF DELHI) [(2001) 2 SCC 28]** where their Lordships, after considering the case of BACHAN SINGH vs. STATE OF PUNJAB [(1980) 2 SCC 684], MACHHI SINGH vs. STATE OF PUNJAB [(1983) 3 SCC 470], NIRMAL SINGH vs. STATE OF HARYANA [(1999) 3 SCC 670] and other cases reiterated the principles and held that it is in rarest of rare cases that capital punishment has to be awarded. For deciding whether it is rarest of rare cases or not, certain factors are required to be examined by the court and court has to scale the mitigating and aggravating circumstances before deciding to award death penalty. Their Lordships held that when the murder is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community that the court may consider awarding of capital punishment. The death penalty need not be inflicted except in gravest cases of extreme culpability. The court has to consider circumstances of the offender also alongwith the circumstances of the crime. A balance sheet of aggravating and mitigating circumstances has to be drawn and in doing so, the mitigating circumstances have to be

accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before awarding death sentence. Awarding life imprisonment is a rule and death sentence is an exception.

19. Keeping these principles in mind, if we examine the facts of the case, we find that accused no.1 and accused no.2 entered the house of the victim for committing robbery and did not have an idea of committing murder of the deceased. They may not have the idea of committing murder at all as can be seen from their conduct otherwise they would have murdered the two ladies. It is only when they were obstructed or intercepted by Gunjan, Dilip and Swapnil in quick succession that they assaulted upon them and tried to escape. No doubt, two murders are committed to facilitate robbery or escape. In our opinion, considering the circumstances in which the incident has occurred it cannot be said that the murders are committed in grotesque, revolting or dastardly manner. Accused no.2 comes from a poor strata of society. He is aged 26 and plies an autorickshaw. We are informed that his younger brother has recently expired. He has a family to support and we are of the considered view that death sentence, in the facts and circumstances of the case, would not be

justified. We find from the judgment of the Trial Court that the learned Trial Judge has not undertaken the exercise of examining the aggravating and mitigating circumstances, the circumstances in which the incident occurred etc. and, therefore, we are of the view that the death penalty awarded to accused no.2 cannot be confirmed.

20. So far as accused no.1 is concerned, his Criminal Appeal No.1988 of 2005 is partly allowed. His conviction for the offence punishable under Section 395 of I.P.C. is set aside. His conviction for the offences under Sections 450, 397 and 120(B) of I.P.C. is confirmed with sentences. The conviction of accused no.1 under Section 396 of I.P.C. is altered to conviction for the offence of murder punishable under Section 302 and Section 302 read with Section 34 of I.P.C.

20.1 Learned advocate Mr. Supehia is heard on the question of quantum of punishment. He has indicated that the accused no.1 comes from a poor strata of society and has a family to support and this court has come to the conclusion that this is not a rarest of rare case while considering the confirmation case and, therefore, minimum punishment may be awarded.

20.2 Accordingly, accused no.1 is sentenced to undergo imprisonment for life and to pay a fine of Rs.500/-, in default, to undergo S.I. for one month therefor. Accused no.1 is also convicted for the offence of voluntarily causing hurt in committing Robbery punishable under Section 394 of I.P.C. and is punished to undergo imprisonment for life. The sentences awarded to accused no.1 shall run concurrently.

21. So far as accused no.2 is concerned, his Criminal Appeal No.140 of 2006 is partly allowed. His conviction for the offence punishable under Section 395 of I.P.C. is set aside. His conviction for the offences under Sections 450 and 120(B) of I.P.C. is confirmed with sentences. The conviction of accused no.2 under Section 396 of I.P.C. is altered to conviction for the offence of murder punishable under Section 302 read with Section 34 of I.P.C. and considering the background, as discussed in earlier part of this judgment, against death sentence awarded to him, he is sentenced to undergo imprisonment for life and to pay a fine of Rs.500/-, in default, to undergo S.I. for one month therefor. Accused no.2 is also convicted for the offence of voluntarily causing hurt in committing Robbery punishable under Section 394 of I.P.C. and is punished to undergo imprisonment for life. The sentences awarded to accused no.2 shall run concurrently.

22. Criminal Appeal No.2121 of 2005 is allowed. The conviction of accused no.3 – Jayesh Ambalal Patel for the offences punishable under Sections 395, 396 and 120(B) of I.P.C. is hereby set aside. He is acquitted of the charges levelled against him. Since he is on bail, his bail bond shall stand cancelled. Fine, if paid, shall be refunded to him.

23. The Confirmation Case stands disposed of by refusing to confirm the death penalty for the foregoing reasons.

(A.L. Dave, J.)

(Bankim N. Mehta, J.)

gt/hki